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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 292

WILLIAM MURRAY ESTEP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE UNITED STATES

On September 20, 1944, petitioner was indicted (R. 1) in the United States District Court for the Western District of Pennsylvania in one count charging that he knowingly failed to submit to induction as directed by the order of his local board, in violation of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. 311). The evidence at the trial showed that petitioner registered with his local board on June 30, 1942, and that he filed his Selective Service questionnaire on August 22, 1942 (R. 6). In that document he stated that he was twenty years old; that he had been a

minister of Jehovah's Witnesses since March, 1936; that he was conscientiously opposed to all war; that he had had no schooling other than eight years of elementary school and four years of high school; and that he had worked as a mason's helper in 1941 (R. 161–164). On October 3, 1942, he was classified 1–A by his local board by unanimous vote, and on August 2, 1944, he was finally classified 1–A by the unanimous vote of his Board of Appeal (R. 6, 164–165).[1] On September 1, 1944, the local board sent petitioner an order to report for induction on September 11, 1944 (R. 8). Petitioner reported on that date and was transported to the induction station where he was found acceptable to the Armed Forces (R. 31). He declined, however, to undergo the induction ceremony on the ground that he was entitled to exemption from military service as a minister of religion (R. 32–34, 38–39).

Testifying in his own defense, petitioner admitted that he refused to submit to induction (see R. 103–113). His proffered defense was that his local board and appeal board had improperly classified him and that the local board had departed from the Selective Service Regulations in handling his case (see R. 25–30, 42–52,

[1] The decision of the Board of Appeal was delayed by the fact that shortly after petitioner was classified 1–A by his local board his file was inadvertently misplaced or lost and was not found until sometime in 1944 (R. 9–10).

55–59, 61–64, 67–74, 79–97). The district court declined to recognize this defense and instructed the jury that "we must accept [the Selective Service classification] as a proper classification; and the only issue we have to determine in this case is whether or not this defendant complied with the law by submitting to induction or not" (R. 147). Petitioner was convicted (R. 156)[2] and was sentenced to imprisonment for five years (R. 160).

Upon appeal to the Circuit Court of Appeals for the Third Circuit, sitting *en banc*, the judgment of the district court was affirmed by the vote of four judges (R. 281–306, 307), with two judges dissenting. The opinion of the court held that petitioner was required to complete the Selective Service procedure before he could challenge the action of the Selective Service System in the courts by resorting to habeas corpus, and that the procedure was not completed until the induction order was complied with by submitting to induction (R. 281–289). The dissenting judges were of the view that the Selective Service procedure had come to an end when petitioner's acceptability to the Armed Forces was ascertained; that he was there-

[2] Pursuant to stipulation of the parties (R. 154–155) that since a unanimous verdict was unobtainable, the case should be decided by a majority verdict of the jury, the court accepted the vote of eleven of the jurors as the verdict (R. 155–156).

fore entitled to attack his classification in defense of the prosecution in his criminal trial; and that if petitioner had submitted to induction, he would have voluntarily placed himself under military jurisdiction and habeas corpus would not be available to test the legality of the administrative action. (R. 289–306.)

It is petitioner's contention in this Court, as it was in the courts below, that by reporting to the induction station, where his acceptability to the Armed Forces was ascertained, he fully completed the selective process and that he was therefore entitled to challenge the legality of the induction order in his criminal trial. We agree with the opinion of the court below (R. 281–289) that the rationale of *Falbo* v. *United States*, 320 U. S. 549, requires that the induction order must be unhesitatingly obeyed. Only after the registrant has submitted to induction is the process of the Selective Service System at an end and it is only then that he may resort to the courts to challenge the legality of the administrative proceedings. The considerations in support of the Government's position were fully argued in the Circuit Court of Appeals and they are fully discussed in the opinion of the court. In these circumstances, no useful purpose would be served in reasserting them in this memorandum. Suffice it to say that the Government agrees with the opinion of the Circuit Court of Appeals.

It is to be noted that the broad question presented here as to the reviewability in a criminal prosecution of the proceedings and actions of the Selective Service authorities is, we think, involved in *Smith* v. *United States,* 148 F. (2d) 288 (C. C. A. 4), No. 66, this Term, which is presently pending before the Court on writ of certiorari. Since the *Smith* case is shortly to be argued, the Court may desire to withhold decision on the instant petition for a writ of certiorari until that case is decided.

Respectfully submitted.

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